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INTRODUCTION

The Educational Employment Relations Act of 1976[2] (EERA) purports to establish a system of collective bargaining for California school district employees working in grades kindergarten through fourteen. In addition, recent legislation has expanded the jurisdiction of the Board established under the EERA to provide a similar form of bargaining for state employees and to change the name of the agency to the Public Employment Relations Board (PERB).[3]

It is the thesis of this article that the California Legislature, because of competing interests and compromises made during the course of the passage of the EERA, fell far short of enacting true bilateral collective bargaining for public school employees. Indeed, with the exception of mandated recommendations in the fact-finding process when third-party intervention occurs, the end result of "bargaining" under the EERA is almost identical with the result under the antecedent Winton Act provisions, which governed public school employer-employee relations for a decade in California.[4] The EERA does not extend the right to strike to the employees covered,[5] nor

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1. CAL. GOV'T CODE § 3549 (West Supp. 1978).

2. *Id.* §§ 3540-3549.3.

3. *Id.* § 3512.41.

4. 1965 Cal. Stats., ch. 2041, § 2, at 4660 (amended by 1970 Cal. Stats., ch. 1412, § 6, at 683; 1970 Cal. Stats., ch. 1413, § 6, at 2686; repealed 1975). "The enactment of this article shall not be construed . . . as prohibiting a public school employer from making the final decision with regard to all matters specified under [the negotiations section]." *Id.* at 4663.

5. CAL. GOV'T CODE § 3549 (West Supp. 1978). The California Supreme Court has not spoken on the right of school district employees to strike; however, several District Courts of Appeal have uniformly held that the right does not exist. *See* Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers, 72 Cal. App. 3d 100, 140 Cal. Rptr. 41 (1977).

does it provide for other forms of compulsory or mandatory settlement of interest disputes. It cannot be gainsaid that true collective bargaining does not embrace the notion that one party or the other may "make the final decision" with regard to the subject matter of bargaining. Therefore, it must be assumed that strong policy considerations have prevented the California Legislature from extending true collective bargaining to such public employees. It is the opinion of the author that halfway measures on the road to true bilateral collective bargaining in the public sector may produce hostility and turmoil between the parties and that true bilateral bargaining for public employees, with all its benefits and burdens, would lead to stability in a positive way.

By comparison, the Oregon experience with public employee bargaining may be instructive. The Oregon Act[6] provides a system of collective bargaining in omnibus form for all public employees in the state. When the parties fail to reach agreement at the bargaining table, third-party intervention is provided in the form of mediation, fact-finding, and post-fact-finding mediation. As in California, the fact-finding is with recommendations to the parties, and such recommendations must be made public within a specified period following their receipt.

The Oregon Act does not stop there, however. Under that statute, employees have the right to strike so long as ten days' notice is given of the anticipated work stoppage. The employer may then decide to take the strike and "tough it out," or in the alternative, apply to the court of highest jurisdiction in the county for an order restraining the work stoppage.[7] If after a hearing the court determines that the public welfare, health, and safety would be endangered by the work stoppage, the court may grant injunctive relief to the employer-applicant. However, where the relief sought is granted, the court must refer the controverted matters to final and binding arbitration within ten days. Because of the abhorrence of management and most employee organizations for a process where an outsider in effect "writes" the contract for the parties, very few disputes have reached this stage in Oregon. Instead, the parties have

6. OR. REV. STAT. § 243.650 (1977).

7. Legislation enacted in 1977 requires that the employee union for organization specify the exact date upon which the strike will commence. This revision was made to prevent union notices which stated that the strike would begin "on or after" a certain date. Public Employee's Rights and Benefits, ch. 243, § 243.650 (1977).

settled their differences at the bargaining table with or without mediation and fact-finding, resulting in fewer strikes in Oregon after the enactment of the Act in 1973 than when the state had no law on public employee bargaining. In the public schools, there have been less than half a dozen strikes by certificated employees and only one classified employees' strike.

Oregon did not have a "Winton Act Era" as did California. It was hoped that the Winton Act experience in California would provide the parties with experience in the give-and-take mode of bargaining. It is questionable, however, that the ten years of experience under Winton were productive in light of the strikes and unrest presently being experienced in the school districts of the state. It may be that while the bargaining process has developed in sophistication over the years, the absence of effective interest dispute resolution machinery has caused unrest and turmoil in school labor relations from the inception of the EERA.

THE BALANCE OF POWER IN THE PRIVATE AND PUBLIC SECTORS

Prior to 1935, pre-Wagner Act legislation[8] gave employees the right to organize and bargain collectively, but the absence of any enforcement power rendered the right virtually useless. Management by and large ignored the rights of employees, formed company unions to go through the motions of bargaining, and discharged employees who took their "rights" seriously. The turmoil in labor relations that ensued during the early part of this century persuaded Congress to enact new legislation in 1935[9] pursuant to its power under the Commerce Clause of the Constitution.[10]

The rights extended to employees under the Wagner Act and continued in succeeding legislation included (1) the right to organize, (2) the right to bargain collectively, and (3) the right to engage in strikes, picketing, and other concerted activities.[11] This package of rights was considered essential to establish a balance of bargaining power between employer and em-

8. Erdman Act, ch. 370, 30 Stat. 424 (1898); Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27, 44 (1970)); Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (current version at 45 U.S.C. § 151 (1970)); Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (current version at 29 U.S.C. §§ 101-115 (1970)).

9. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-166 (1970)).

10. U.S. CONST. art. I, § 8.

11. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 151 (1970)).

ployee and to avoid the inadequacies of the earlier laws on the subject. The private sector knows no "final decision" power in the hands of one party to the bargaining process.

In the California public schools the balance of power has been further restricted by a scope of bargaining provision which limits bargaining to certain enumerated topics.[12] Although the "wedge words" *matters relating to* contained in the scope section may operate to expand the scope of bargaining under the Act, if the scope of bargaining is strictly confined to the matters enumerated, the governance of curriculum and other educationally related matters will be reserved to the publicly elected school board members. In instances where the scope has been enlarged in contract talks, such expansion has taken place at the bargaining table where school boards have acted in hopes of avoiding conflict situations. No major scope decision has been made by the PERB in the two years since enactment of the legislation.[13] Almost certainly the scope question will be before the courts following PERB consideration of the matter.

PRACTICAL PROBLEMS AND CONFLICTING PERCEPTIONS OF POWER

In the private sector when impasse in bargaining has been reached, the employer may unilaterally implement its last proposal. For this reason unions resist declarations of impasse, and

12. CAL. GOV'T CODE § 3543.2 (West Supp. 1978) provides:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

13. In Jefferson School Dist., [1978] 2 PUB. EMPLOYEE REP. CAL. (LRP) 354 (July 13, 1978) and Healdsburg Union School Dist., [1978] 2 PUB. EMPLOYEE REP. CAL. (LRP) 384 (July 14, 1978), the Hearing Officers made exhaustive analyses of the scope questions in reaching their decisions. Both decisions have been appealed to the PERB.

much case law has developed surrounding factual situations wherein impasse does or does not exist. Under the EERA, little doubt exists as to whether impasse is present because one party or the other has openly declared such status, the agency has investigated and appointed a state mediator, and such person has appeared to mediate the dispute. Therefore, the local board of education, taking a page from the private sector and relying on California Government Code section 3549, may be tempted, once mediation and fact-finding have been completed, to get on with the process and make the final decision. The language of section 3549 quoted at the outset of this article may act to lull the school board into a false sense of security and precipitate action, thereby increasing the danger of turmoil in employer-employee relations. This potential exists because the board of education presumes that the law enables it to make the final decision once the motions of mediation and fact-finding have been completed. On the other hand, the exclusive representative reads the law to provide it with parity at the bargaining table. This perception may prompt the latter to engage in other concerted activities in the form of strikes or slowdowns in order to bring its viewpoint home to the employer. Both "perceptions" of power inexorably lead to conflict situations.

Imagine a case in which a school board and an exclusive representative of teachers reopened the topics of wages and class size in the second year of a two-year contract which provided for such openers. The mediator refused to certify the matter to fact-finding,[14] and following impasse declaration and mediation sessions the board made the "final decision" to implement its last salary offer (in the private sector sense) and to take no action on class size. This "final decision" prompted a strike threat by the organization, the filing of a temporary restraining order, a grievance under the contract, and an unfair practice charge. The "final decision" of the board of education did not turn out to be a final decision in the sense encapsulated in section 3549 and relied upon by the board. Rather, it resulted in increasing the antagonism and unrest between the parties. The conditions described in this hypothetical series of events do not seem to comport with the purpose of the EERA to "promote the improvement of personnel management and employer-employee relations within the public school systems

14. CAL. GOV'T CODE § 3548.1 (West Supp. 1978).

in the State of California."[15]

Consider another case in which, after nearly two years of bargaining, a school board and an exclusive agent of teachers entered into mediation and fact-finding. Approximately twenty issues remained at the fact-finding step. Because the fact-finding chairman recommended several unpopular courses of action to the board, including provisions for binding arbitration or grievances, the board rejected the fact-finding recommendations. The board contemplated making the final decision on all matters under section 3549, but it encountered certain practical problems: (1) What would be the final product if the board acts unilaterally? Board rules governing salaries only? A "bilateral contract" on all matters signed by only one party (the board)? (2) What would be the result of no action in terms of employee morale? (3) Would no agreement cause labor problems for years to come? This dilemma led the parties to post-fact-finding mediation for several round the clock sessions, expenditure of funds beyond that anticipated by the board, a strike vote and threatened walkout, and finally a mediated settlement which left a residue of animosity and ill will between the parties on a personal level.

CONCLUSION

THE NEED TO ADD TEETH TO IMPASSE RESOLUTION

In view of the experience in other states and the private sector, a strengthened form of impasse resolution should be added to the EERA in order to equalize the relationship between the parties. The typical conflict situations described above may, in large measure, be due to the relative newness of the process and the lack of sophistication on the part of the parties to the bargaining process. Although the Winton Act provided some experience in bargaining and was a successful vehicle when both parties engaged in good-faith efforts to make the process work, there remain eddies and backwaters where the Winton Act experience hardly left a scratch upon the reality of resolution of interest disputes.

Despite the words of the statute, a local board of education does not have, as a practical matter, the final decision-making power, nor does the employee organization or union have true parity at the bargaining table. This lack of a balance of power

15. *Id.* § 3540.

leads to actions in areas of "perceived" power and may, as a result, disrupt the total process in a real sense. In sum, "perceived" rather than real power may lie at the present problems over the final decision-making process. Bargaining is a power relationship. In the final analysis, the legislature may have to place the power to make the final decision in the hands of outsiders who will compel a settlement in order to preserve the balance of power and dispel the chaos which may result from the uses of perceived, but not real, power.

Adolf Berle, in his classic study of power relationships,[16] avers that man, even in the dim mists of antiquity, discovered that the order and predictability which results from power and its distribution is preferable to the chaos which exists in the absence of such power creation, distribution, and use. In Greek thought, Zeus personified power in its good and bad aspects, and was much to be preferred over meaningless chaos: "Zeus personified power, its vices as well as its usefulness. Because he used power to bring a measure of predictability, and therefore order, he became supreme . . . Power, raw and terrible, was preferable to chaos."[17] Berle's first law of power is that power invariably fills any vacuum in human organization. As between chaos and power, the latter always prevails.[18]

Collective bargaining is an exercise in the creation, garnering, and use of power. Undoubtedly further power sharing will occur in California public school employer-employee relations. While this author agrees that the scope of bargaining issue is all pervasive in the formal relationships which will emerge under employee relations statutes, it is predicted that scope issues will be decided much as they have been under federal laws in the private sector. Since the right to strike is the ultimate power weapon in the arsenal of the union or organization, the legislature may have to decide to provide such a right in order to balance the power with or without some compulsory settlement processes. Finally, if the right to strike is granted, the legislature will have to carefully consider whether, in order to further balance the power relationship, the legislative "superprotections" allowed teachers in the form of tenure and other benefits should be removed so that true bilateral determinations may be made over job security, wages, and other matters now fixed by statute.

16. A. BERLE, POWER (1967).
17. *Id.* at 6-7.
18. *Id.* at 37.